

Casey's Enterprises, LLC  
dba Casey's General Stores #1940  
500 North Flynn Road  
Westville, Indiana 46391

DL46-20235  
District 1

**FINDINGS OF FACT**  
**AND**  
**CONCLUSIONS OF LAW**

I.  
BACKGROUND OF THE CASE

The Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Stores #1940, 500 North Flynn Road, Westville, Indiana 46391, ("Permittee") is the applicant for an Alcohol and Tobacco Commission ("ATC") type 115 permit, # DL46-20235.<sup>1</sup> The Permittee filed its application on or about February 10, 2003. The application was assigned to the LaPorte County Local Alcoholic Beverage Board ("LB") for review. The LB held a hearing on May 1, 2003 and recommended denial of the permit.<sup>2</sup> The ATC adopted the recommendation of the LB on May 20, 2003 and denied the permit.

The Permittee filed a timely notice of appeal and the appeal was assigned to ATC Hearing Judge, Mark C. Webb ("HJ"). An appeal hearing was held on October 16, 2003. The permittee was represented by attorney \_\_\_\_\_, of Barnes & Thornburg, and remonstrator Metropolitan School District of New Durham Township was represented by attorney Thomas L. Blessing, of Stewart & Irwin. Witnesses were sworn, evidence was heard and the matter was taken under advisement. The HJ now tenders his Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II.  
EVIDENCE AT THE LOCAL BOARD HEARING<sup>3</sup>

- A. The following evidence was submitted in support of the permittee in this cause:  
Casey's has been in business for 35 years and has approximately 1300 stores

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<sup>1</sup> Beer and wine (grocery) dealer located in an incorporated area. *See*, IC 7.1-3-5-2(a).

<sup>2</sup> LaPorte County has two (2) LBs, each of which has four (4) members. *See*, IC 7.1-2-4-5. Board #1 hears all permit matters outside of LaPorte, and includes the Michigan City mayor's appointee, Norman Pahs. *See*, IC 7.1-2-4-7. Board #2 hears only LaPorte matters and substitutes Al Lenard, the LaPorte mayor's appointee for Mr. Pahs. Because this permit is located in Westville, it was heard by Board #1. However, Al Lenard sat with Board #1 at the hearing and voted to deny the permit. His vote, however, is invalid. Therefore, this HJ will consider the LB vote to have been 4-0 against granting this permit. The transcript, however, does not reflect the vote of LB member Sara Bewley, the ATC designated member (and thus a member of both boards), but she did sign the voting sheet indicating her vote to reject the application.

<sup>3</sup> Because of comments made by the chairman of the LB, as well as a letter received during 2003 by the Commission from the LB criticizing the Commission's awarding of a permit to a convenience store/gas station over a contrary recommendation by the LB, this HJ will briefly summarize the hearings and focus primarily on the fairness of this hearing in the first place.

operating in 9 states, the majority of which sell alcoholic beverages. Notwithstanding that fact, the company has not received any citations for illegal sales. The company has a training program in place which helps ensure that its clerks sell alcoholic beverages only to people who are at least 21 years old. Training is done on a quarterly basis. Casey's uses the "We Card" system for screening potential illegal purchases of alcohol. Casey's is a grocery store which sells meats, dairy items, bakery products, eggs, juice, soda, health and beauty items, paper products, pet foods and other items associated with a grocery store, for a total of approximately 1700 grocery items at their stores.<sup>4</sup> The location at issue is more than 200 feet from any church or school, and in a commercial area. A need exists because customers desire to purchase alcoholic products from these stores.<sup>5</sup>

- B. The following evidence was submitted in support of the remonstrators and against the permittee in this cause: Westville is a very small community with a population of 2116 persons. There are four taverns, one package liquor store and one pharmacy with a liquor license. Additionally there are five convenience stores in town.<sup>6</sup> The school has just over 700 students in grades K-12, with 300 of them in grades 7-12 with an estimated 1/3 of them were using alcohol. Alcohol programs are offered by the school at a cost of almost \$4000 per year, in an effort to convince children and young adults not to consume alcohol. Beer is the most popular alcoholic beverage among young people. A local high school student died from drinking and driving last year. Allowing Casey's to sell alcoholic beverages will increase the availability of alcohol to high school students in the community, which according to school officials, the community does not want.
- C. Comments by the LB: At the hearing, LB Chairman Gene Parrott Board chairman Gene Parrott confirmed that the LB had a long-standing policy of not awarding grocery permits to stores which sell gasoline. In addition, this LB on March 19, 2003, wrote a letter to the ATC criticizing a decision by the Commission to overturn a recommendation of the LB denying a permit to a convenience/grocery store. The contents of this letter, addressed to then Chairman Mary DePrez reads as follows:

"On July 13, 2002, the LaPorte County Alcoholic Beverage Commission [sic] denied an application by Gas City, formerly, Crazy D's, for a beer/wine permit by a 4-0 vote. On December 18, 2002, the appeal was heard by the state commission and approved on February 18, 2003. The statement made by your commission that the LaPorte County Alcoholic Beverage Commission [sic] has issued this type of permit to filling stations/convenience stores in the

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<sup>4</sup> This HJ acknowledges that identical Casey's General Stores in Indiana have been determined by the Commission to be grocery stores. *See*, (list permits)

<sup>5</sup> This very generic statement of need or desire, while some evidence, is nonetheless self-serving, and in the absence of additional support, such as signed petitions, is entitled to minimal weight when compared to identifiable individuals who are willing to voice their opposition to this permit.

<sup>6</sup> Presumably without alcohol grocery permits.

past is simply not true. I have been on this board since 1988 and *I know for a fact that we have not issued any permits of this type. By over-riding [sic] the local board's decision in this matter, you've opened up a can of worms that will be nearly impossible to control.*

Since the state hasn't determined a definition for "grocery store", any one who wants to sell any type of food can qualify for a beer/wine permit. *Our local board, however, will stand by the commitments we've made to the county in the past by refusing to issue these permits to a convenience store that sells gasoline. We feel very strongly that gasoline and beer do not mix.*" (Emphasis supplied).

The letter is signed by all members of both LBs other than the Commission's designated member.<sup>7</sup>

### III. EVIDENCE BEFORE THE ATC

The school district was the primary remonstrator before the ATC and no additional arguments were made nor evidence presented, the sum and substance of which was not presented before the LB.

The comments of the chairman of the LB as well as the March 19, 2003 letter to the Commission are troubling. All prospective permittees are entitled to fair hearings before the LBs. They are entitled to assume that LBs will determine whether or not to award permits based on statutorily permissible criteria, and not based on an arbitrary standard unfounded in law. With respect to convenience/grocery stores, it is a reality in this day and age that grocery stores sell gasoline. The law does not permit denial of a permit for this reason. While the Commission has struggled over the years with what constitutes a grocery store, no statute by the General Assembly nor rule, regulation, or decision of the Commission has ever determined that the presence of gas pumps justifies by itself a negative recommendation. Yet, the LB comments further confirms the fact that the decision of this LB when it comes to grocery permits and convenience stores is made up before any evidence is ever heard. It is clear to this HJ that no convenience store, no matter how well stocked or diverse its offerings, will ever be awarded a permit by this LB irrespective of the evidence it presents. The proper issue here is whether the permit premises is a grocery store, and if so, whether the location is appropriate for a permit. Since the Commission has found identical Casey's stores throughout the state to be grocery stores, the LB's focus

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<sup>7</sup> This HJ would note that this issue goes only to this LB's treatment of grocery/convenience store permit applicants and does not, to this HJ's knowledge, extend to any other type of permit.

should have been on Rule 27-4.<sup>8</sup> However, the LB instead simply stated that because Casey's sells gasoline, they cannot be awarded a permit. The LB's recommendation is arbitrary and capricious in this regard alone and cannot stand.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to recommend denial of the new permit application in this matter was arbitrary and capricious, not based on substantial evidence and cannot be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Permittee and against the recommendation of the LB. The appeal of Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Stores #1940, 500 North Flynn Road, Westville, Indiana 46391 for the application of this Type 115 permit, # DL46-20235 is granted and the recommendation of the LB in this matter is reversed.<sup>9</sup>

DATED: \_\_\_\_\_

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MARK C. WEBB, Hearing Judge

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<sup>8</sup> This HJ acknowledges that the school district and some students objected to the permit because they felt it was too close to the school. However, IC 7.1-3-21-11 only forbids those permits within 200 feet. Here, there was no evidence nor any claim that this statute would be violated by the award of this permit. Moreover, the remonstrance here was not sufficient to ameliorate the impermissible moratorium on grocery/convenience store permits imposed by the LB.

<sup>9</sup> Even though the evidence of need and desire for the services at that location on behalf of Casey's was less than ideal, a position by a LB so blatantly and legally flawed as that shown here cannot be tolerated.